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80-1610

No. .

In the

Supreme Court of the United States.

OCTOBER TERM, 1980.

DENNIS J. ROBERTS II,
IN HIS CAPACITY AS ATTORNEY GENERAL
OF THE STATE OF RHODE ISLAND,
AND
EDWARD F. BURKE,
IN HIS CAPACITY AS ADMINISTRATOR OF THE
RHODE ISLAND DIVISION OF PUBLIC UTILITIES AND CARRIERS,
APPELLANTS,

v.

NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION,
THE STATE OF NEW HAMPSHIRE,
NEW HAMPSHIRE LEGISLATIVE UTILITY
CONSUMERS' COUNCIL,
NEW ENGLAND POWER COMPANY, AND
THE COMMONWEALTH OF MASSACHUSETTS,
APPELLEES.

ON APPEAL FROM THE SUPREME COURT OF THE
STATE OF NEW HAMPSHIRE.

Jurisdictional Statement.

DENNIS J. ROBERTS II,
ATTORNEY GENERAL,
72 Pine Street,
Providence, Rhode Island 02903.
(401) 274-4400

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

Questions Presented.*

Invoking for the first time a 1913 state statute, the New Hampshire Public Utilities Commission ("PUC") has prohibited New England Power Company ("NEP") from selling outside the state any energy generated by NEP's federally-licensed hydroelectric projects in New Hampshire. The energy is currently delivered to an interstate transmission network and sold in three New England states including New Hampshire. Dennis J. Roberts II, in his capacity as Attorney General of the State of Rhode Island, and Edward F. Burke, in his capacity as Administrator of the Rhode Island Division of Public Utilities and Carriers ("Rhode Island Appellants"), appeal from a judgment of the New Hampshire Supreme Court upholding the state statute as applied by the PUC. The questions presented are:

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* All of the parties appearing before the New Hampshire Supreme Court are listed in the caption.

Appellant Dennis J. Roberts II, Attorney General of the State of Rhode Island, is, pursuant to Section 42-9-6 of the General Laws of Rhode Island of 1956, as amended, the "legal advisor of all state boards, divisions, departments, and commissions and the officers thereof. . . ." Under the common law, he is the representative of the public, empowered to bring actions to redress grievances suffered by the public as a whole.

Rhode Island General Laws of 1956, Section 39-1-1 et seq., (as amended), vests in Appellant Edward F. Burke, Administrator of The Division of Public Utilities and Carriers,

> the exclusive power and authority to supervise, regulate, and make orders governing the conduct of companies offering to the public in intrastate commerce energy . . . for the purpose of increasing and maintaining the efficiency of such companies, according desirable safeguards and convenience to their employees and the public, and protecting them and the public against improper and unreasonable rates, tolls, and charges by providing full, fair, and adequate administrative procedures and remedies. . . .

1. Whether the New Hampshire statute as applied by the PUC to secure the economic benefits of hydroelectric energy generated within the state exclusively for the citizens of that state unduly burdens interstate commerce in violation of the Commerce Clause of the United States Constitution.

2. Whether Part I of the Federal Power Act, vesting comprehensive licensing authority in the Federal Energy Regulatory Commission ("FERC") over NEP's hydroelectric projects, preempts the statute as applied by the PUC.

3. Whether Part II of the Federal Power Act, vesting exclusive jurisdiction in FERC over wholesale sales of electricity in interstate commerce, preempts the state statute as applied by the PUC to require NEP to rearrange its existing wholesale tariffs and contracts to effect a transfer of the economic benefits of the hydroelectric energy to New Hampshire citizens.

4. Whether the New Hampshire statute as construed and applied by the New Hampshire Supreme Court and the PUC violates the privileges and immunities of the citizens of the State of Rhode Island and the Commonwealth of Massachusetts in contravention of article IV, § 2 of the United States Constitution.

5. Whether, assuming that Congress has exempted the New Hampshire statute from the reach of the Commerce Clause, Congress has violated that Clause by favoring one state over another in an area of fundamental economic and social importance, or, alternatively, whether Congress has violated the rights of the State of Rhode Island and its citizens and the Commonwealth of Massachusetts and its citizens, as guaranteed by the Tenth Amendment or the Privileges and Immunities Clause.

Rhode Island Appellants have adopted the formulation of questions 1, 2 and 3 as presented in NEP's Jurisdictional Statement filed in the companion case of *New England Power Company* v. *New Hampshire Public Utilities Commission, et*

al., No. 80-1208 ("NEP" Juris. St."). Likewise, Rhode Island Appellants have adopted the formulation of questions 4 and 5 as presented in the Commonwealth of Massachusetts' Jurisdictional Statement filed in the companion case of *Commonwealth of Massachusetts, et al.* v. *New Hampshire Legislative Consumers' Council*, No. 80-1471 ("Mass. Juris. St.").

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DENNIS J. ROBERTS II,
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EDWARD F. BURKE,
IN HIS CAPACITY AS ADMINISTRATOR OF THE
RHODE ISLAND DIVISION OF PUBLIC UTILITIES AND CARRIERS,
APPELLANTS,

v.

NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION,
THE STATE OF NEW HAMPSHIRE,
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CONSUMERS' COUNCIL,
NEW ENGLAND POWER COMPANY, AND
THE COMMONWEALTH OF MASSACHUSETTS,
APPELLEES.

ON APPEAL FROM THE SUPREME COURT OF THE
STATE OF NEW HAMPSHIRE.

Jurisdictional Statement.

Opinions Below.

The opinion of the New Hampshire Supreme Court, dated December 23, 1980, is not yet reported. It is reprinted in Appendix A to the NEP Juris. St.

The New Hampshire Public Utility Commission's Reports and Orders dated August 27, 1980 and September 19, 1980 are also unreported. They are reprinted in NEP Juris. St., Appendices B and C, respectively.

Jurisdiction.

This is an appeal from a final judgment of the New Hampshire Supreme Court upholding a New Hampshire statute as applied by the New Hampshire Public Utilities Commission to ban the export of hydroelectric energy generated within the state by NEP. The court rejected claims that the statute as so applied violates the Constitution and laws of the United States. Judgment was deemed to have been entered on December 23, 1980, when the decision of that court was docketed by its clerk. Rhode Island Appellants' notice of appeal was filed below on or about January 12, 1981 (App. A, *infra*). This Court has jurisdiction of this appeal under 28 U.S.C. § 1257(2).

Constitutional and Statutory Provisions Involved.

This case raises questions concerning the validity of New Hampshire's hydroelectric export statute, NH RSA 374:35, under the Commerce Clause (art. I, § 8, cl. 3), the Supremacy Clause (art. VI, cl. 2), the Privileges and Immunities Clause (art. IV, § 2, cl. 1), the Tenth Amendment and the Federal Power Act (16 U.S.C. §§ 792-824 k).

NH RSA 374:35 provides:

> Permission Required. No corporation engaged in the generation of electrical energy by water power shall en-

gage in the business of transmitting or conveying the same beyond the confines of the state, unless it shall first file notice of its intention to do so with the public utilities commission and obtain an order of said commission permitting it to engage in such business. Any such corporation engaged in the business of transmitting or conveying such electrical energy beyond the confines of this state pursuant to such order shall discontinue such business in whole or in part, to such extent and under such conditions as the commission may order, whenever, after notice to such corporation and hearing thereon, the commission shall find that such electrical energy or the portion thereof affected by said order is reasonably required for use within this state and that the public good requires that it be delivered for such use.

The texts of the Commerce Clause, the Supremacy Clause, the Privileges and Immunities Clause and the Tenth Amendment are set forth in Appendix A to Mass. Juris. St., and therefore are not repeated here. Relevant portions of the Federal Power Act are set forth in NEP Juris. St.; Appendix E, and likewise are therefore not repeated here.

Statement of the Case.

NEP and Massachusetts have each accurately and competently set forth the Statement of the Case in their respective Jurisdictional Statement. Therefore, Rhode Island Appellants adopt and rely upon those Statements for the purposes of this Jurisdictional Statement.

The Questions are Substantial.

NEP and Massachusetts have each accurately and competently set forth at length in their respective Jurisdictional Statements the reasons why these questions are substantial. Therefore, Rhode Island Appellants adopt and rely upon those arguments for the purposes of this Jurisdictional Statement.

It should be noted that approximately twenty-two percent (22%) of NEP's generation is sold to Rhode Island customers. While it may be difficult to fix the precise economic impact of the New Hampshire decisions upon such customers, no party to this proceeding suggests that the stakes herein are less than enormous, not merely in money but also in the potential for human suffering. This fact is amply illustrated by the range of interests arrayed against the New Hampshire Appellees in these appeals.

Conclusion.

Probable jurisdictions should be noted. The Court may want to consider summary reversal.

Respectfully submitted,

DENNIS J. ROBERTS II,
Attorney General,
72 Pine Street,
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(401) 274-4400

March, 1981.

APPENDIX

Appendix A.

The State of New Hampshire Supreme Court.

APPEAL OF NEW ENGLAND POWER COMPANY

Docket No. 80-396.

Notice of Appeal to the Supreme Court of the United States.

Notice is hereby given that Dennis J. Roberts II, in his capacity as Attorney General of the State of Rhode Island and Edward F. Burke, in his capacity as Administrator of the Rhode Island Division of Public Utilities and Carriers, appellants below, hereby appeal to the Supreme Court of the United States, pursuant to 28 U.S.C. Section 1257(2), from the final judgment of the New Hampshire Supreme Court entered on December 23, 1980, which upheld against constitutional challenge, NH RSA 374:35 and Order No. 14,492 of the New Hampshire Public Utilities Commission.

Respectfully submitted,

DENNIS J. ROBERTS II,
Attorney General,
EDWARD F. BURKE,
Administrator.

By their attorneys,

DENNIS J. ROBERTS II,
Attorney General,
JOHN R. McDERMOTT,
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Dated: January 9, 1981.

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No. 80-1610

In the

SUPREME COURT OF THE UNITED STATES.

October Term, 1980

DENNIS J. ROBERTS II,
in his capacity as Attorney General
of the State of Rhode Island,
and
EDWARD F. BURKE,
in his capacity as Administrator of the
Rhode Island Division of Public Utilities and Carriers,
Appellants,

v.

NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION,
THE STATE OF NEW HAMPSHIRE,
NEW HAMPSHIRE LEGISLATIVE UTILITY
CONSUMERS' COUNCIL,
NEW ENGLAND POWER COMPANY, and
THE COMMONWEALTH OF MASSACHUSETTS,
Appellees.

On Appeal From The Supreme Court of the
State of New Hampshire.

MOTION OF THE LEGISLATIVE UTILITY CONSUMERS' COUNCIL.

William L. Shaine,
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110 N. Main Street
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(603) 225-7500

April 1981

In their appeal, Rhode Island Appellants have adopted the formulation of questions 4 and 5 as presented in the Commonwealth of Massachusetts' Jurisdictional Statement filed in the case of Commonwealth of Massachusetts, et al v. New Hampshire Legislative Utility Consumers' Council, No. 80-1471. Therefore the following Motion to Dismiss or Affirm is identical to that offered by the Legislative Utility Consumers' Council in No. 80-1471. References to the Commonwealth apply equally to Rhode Island Appellants.

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-1610

Dennis J. Roberts II, et al
Appellant

v.

New Hampshire Public Utilities Commission, et al
Appellees

MOTION TO DISMISS OR AFFIRM

The appellee New Hampshire Legislative Utility Consumers' Council respectfully moves to dismiss the fourth and fifth questions presented in the above captioned appeal on the ground that the questions are so unsubstantial as not to warrant further argument.

SUMMARY OF ARGUMENT

The privileges and immunities clause (art. IV §2) of the United States Constitution does not apply, either directly or indirectly, to the factual situation presented to this Court. New Hampshire's application of N.H. Rev. Stat.

Annot. 374:35 does not have the impact of treating Massachusetts' citizens in the State of New Hampshire differently than N.H. citizens in the State of New Hampshire.

The Commonwealth's argument that §201 (b) of the Federal Power Act is an unconstitutional exercise of the commerce power must fail because appellant fails to state with specificity the constitutional provision with which §201 (b) purportedly conflicts. If the point of appellants argument is that §201 (b) conflicts with the commerce clause, that argument also fails because there is no authority for that proposition and significant authority to the contrary.

Additionally, the tenth amendment is not a bar to the enactment of §201 (b) because §201 (b) does not limit the authority of or infringe upon the State of Massachusetts as a state nor does it infringe upon the citizens of Massachusetts. Section 201 (b) reserves to the State of New Hampshire the right to continue the regulation of the exportation of hydroelectricity as it had done between 1913 and the passage of the Federal Power Act.

Finally, the privileges and immunities clause (art.IV §2) is not a bar to §201 (b) because that clause does not limit federal authority but requires that states treat individuals within their geographic boundaries on a consistent basis, regardless of their place of residence.

ARGUMENT

I. N.H. REV. STAT. ANNOT. 374:35 DOES NOT VIOLATE THE PRIVILEGES AND IMMUNITIES CLAUSE (art.IV, §2) OF THE UNITED STATES CONSTITUTION.

This Court's consistent interpretation of the privileges and immunities clause is the one announced in Toomer v. Witseil, 334 U.S. 385,395 (1948), "The primary purpose of this clause...was to help fuse into one Nation a collection of independent, sovereign States. It was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy." The line of cases in which the clause is used to uphold the rights of a foreign citizen to exercise all the rights of state citizens while in that state are legion and trace

their origin to Corfield v. Coryell, 6 Fed. Cas. 546, 551-52 (Case No. 3230) (C.C.E.D.Pa.1823).See: Paul v. Virginia, 8 Wall 168, 180 (1869), Hague v. CIO, 307 U.S. 496, 511 (1939), Austin v. New Hampshire, 420 U.S. 656, 660-661 (1975), and Baldwin v. Fish and Game Commission of Montana, 436 U.S. 371 (1978).

Appellant Commonwealth of Massachusetts cites no authority to suggest that the privileges and immunities clause applies to foreign citizens who are not physically located in the host state. It is antithical to the concept of state government to suggest that New Hampshire can pass laws which either grants privileges or proscribes actions outside its state.

New Hampshire's law neither grants a right nor denies a privilege to Massachusetts citizens consuming in Massachusetts. It does not even pretend to regulate action of New Hampshire citizens consuming in Massachusetts. New Hampshire could no more regulate Massachusetts consumers consuming in Massachusetts than it can regulate Massachusetts drivers driving in Massachusetts.

What New Hampshire does is proscribe

companies producing hydroelectricity in the State of New Hampshire from shipping the electricity out-of-state without Public Utilities Commission permission. The prohibition falls equivalently on New Hampshire companies and foreign companies. There is no discrimination.

II. SECTION 201 (b) OF THE FEDERAL POWER ACT IS NOT AN UNCONSTITUTIONAL EXERCISE OF THE COMMERCE POWER NOR DO THE TENTH AMENDMENT OR THE PRIVILEGES AND IMMUNITIES CLAUSE INVALIDATE §201 (b).

The Commonwealth of Massachusets, in its fifth question (jurisdictional statement 22), really raises three separate questions. They are:

a. Has Congress somehow violated the Constitution by enacting §201 (b) of the Federal Power Act;

b. Has Congress violated the tenth amendment rights of the Commonwealth of Massachusetts and its citizens by its enactment of §201 (b) of the Federal Power Act; and,

c. Has Congress violated the priviliges and immunities clause (art.

IV, §2) by enacting §201 (b) of the Federal Power Act.

We will treat each of these questions separately.

A. Has Congress somehow violated the Constitution by enacting §201 (b) of the Federal Power Act?

The Commonwealth of Massachusetts argues that Congress' enactment of §201 of the Federal Power Act, 16 U.S. C. §824(b), "is an unconstitutional exercise of the commerce power...." What part of the Constitution is violated, the Commonwealth does not say. The Commonwealth does not argue that the commerce clause itself was violated but rather that the favoring of one state over another is somehow unconstitutional. Absolutely no citation is made for this theory. The Commonwealth may have intended to argue that §201 (b) is inconsistent with the commerce clause but that argument must also fail.

While it does attempt to distinguish Prudential Insurance Company v. Benjamin, 328 U.S. 408 (1946), Secretary of Agriculture v. Central Roig Refining Company, 338 U.S. 604, 616 (1950) and South Caro-

lina v. Katzenbach, 383 U.S. 301, 328-29 (1966), it is completely unsuccessful in this attempt. If the Commonwealth is arguing that §201 conflicts with the commerce clause then the question presented must be answered by looking to Prudential Insurance Co. v. Benjamin, 328 U.S. 408 (1946). Any discrimination associated with §201 (b) only reflects geographical differences and the fact that some states had regulated the exportation of hydroelectricity prior to the enactment of the Federal Power Act. The discrimination is not the product of Congress but of differences in individual legislative initiatives.

Essentially, what the Commonwealth of Massachusetts characterizes as "seriously prejudicial and uneven treatment by Congress" is the simple recognition and ratification in a grandfather clause of prior existing state legislation and regulation and not some unique attempt to deprive the citizens of Massachusetts of their essential rights.

B. Has Congress violated the tenth amendment rights of the Commonwealth of Massachusetts and its citizens by its

enactment of §201 (b) of the Federal Power Act?

The Commonwealth next argues that the tenth amendment prevents Congress from enacting §201 (b) of the Federal Power Act under its plenary authority of the commerce clause. Section 201 (b), very simply, grants to certain states the privilege of continuing to regulate hydroelectricity as they had done before the Federal Power Acts' enaction. It does not in any way infringe upon the rights of citizens of those states having statutes similar to N.H. Rev. Stat. Annot. 394:35 or any other states. Section 201 (b) does not diminish any rights, powers, or previous activities of any state in the union. What §201 (b) does is to extend the privilege of continuing to exercise rights, privileges, and actions which were exercised prior to its passage. The tenth amendment protects states from infringement by the federal government in areas of integral government functions, National League of Cities v. Usery, 426 U.S. 833, 855 (1976). Since there is no infringement by §201 (b) upon any states integral governmental functions, there can be no viola-

tion of the tenth amendment.

C. Has Congress violated the privileges and immunities clause (art.IV, §2) by enacting §201 (b) of the Federal Power Act?

The Commonwealth's last breath is to once again raise the specter of the privileges and immunities clause (art.IV, §2) of the Constitution. The central question raised is whether the privileges and immunities clause applies to the federal government or not. The answer is that it does not.

The Commonwealth fails to cite any authority for the proposition that art.IV, §2 applies to the federal government. It cannot cite any authority because there is none. The privileges and immunities clause of article IV, §2 of the United States Constitution is not an appropriate source with which to challenge a federal statute regulating an area exclusively within the power of Congress. The privileges and immunities clause of article IV, §2 is a limitation on the powers of the states, not Congress, and can in no way limit the power

of Congress over matters within its exclusive authority. The language of the privileges and immunities clause can leave no doubt that it applies to the states and not the federal government. The clause reads:

> "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

There is no hint from the plain meaning of the clause in question that it was meant to apply as a limitation on Congress' authority and no such interpretation should be reached. Additionally, in Lung v. O'Chesky, 414 U.S. 802 (1973), this Court affirmed a decision from the District Court for the District of New Mexico that disfavors the interpretation of the privileges and immunities clause suggested by the Commonwealth. In a percuriam opinion that court said with respect to the privileges and immunities clause, "That clause is a limitation on the powers of the states and in no way affects the powers of Congress over matters in the District of Columbia. Duehay v. Acacia Mutual Life Ins. Co., 70 App. D.C. 245, 105 F2d 768 (1939)." 358

F. Supp. 928, 931 (1973). See also Haavick v. Alaska Packers Association, 263 U.S. 510, 515 (1924).

None of the three subquestions presented under the fifth question raise substantial federal questions. Therefore the Court should not note probable jurisdiction on these questions.

CONCLUSION

For the reasons stated herein, either this appeal should be dismissed with respect to the fourth and fifth questions presented or the judgment of the Supreme Court of New Hampshire should be affirmed on those questions.

Respectfully submitted,
THE NEW HAMPSHIRE LEGISLATIVE
UTILITY CONSUMERS' COUNCIL

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Appellees

On Appeal From The Supreme Court Of
The State of New Hampshire

MOTION OF THE STATE OF NEW HAMPSHIRE AND NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION TO DISMISS OR AFFIRM

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April 1981

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October Term, 1980

No. 80-

DENNIS J. ROBERTS II, ET AL.,
Appellants

v.

NEW HAMPSHIRE PUBLIC
UTILITIES COMMISSION, ET AL.,
Appellees

MOTION TO DISMISS
OR AFFIRM

The appellees State of New Hampshire and New Hampshire Public Utilities Commission respectfully move to dismiss the captioned appeal or affirm the judgment of the Supreme Court of the State of New Hampshire on the ground that the questions presented are so unsubstantial as not to warrant further argument.

STATEMENT

This is the third appeal from the decision of the New Hampshire Supreme Court upholding an order of the New Hampshire Public Utilities Commission. That order required the New England Power Company to sell the power generated at several Connecticut River hydroelectric generating stations to consumers in the State of New Hampshire. The generating stations in question are owned by the Company, and are located within the State of New Hampshire.

The New England Power Company and the Commonwealth of Massachusetts have already appealed the decision of the New Hampshire Supreme Court to this Court. Those appeals are listed upon the docket of this Court as numbers 80-1208 and 80-1471, respectively.

In the instant appeal, the appellants, officials of the State of Rhode Island, adopt as their own the jurisdictional statements filed in this Court by the New England Power Company and the Commonwealth of Massachusetts. The Rhode Island appellants assign no errors and make no arguments not contained in the jurisdictional statements of the other appellants.

The State of New Hampshire and the New Hampshire Public Utilities Commission timely moved this Court to either dismiss the appeals of the New England Power Company and the Commonwealth of Massachusetts or affirm the judgment of the Supreme Court of the State of New Hampshire. Those motions clearly demonstrate that the judgment of the Supreme Court of the State of New Hampshire

is correct, and that the questions presented to this Court in these three appeals are so unsubstantial as not to warrant further argument.

The attention of the Court is invited to the State's motions to dismiss or affirm. Briefly, the State of New Hampshire shows in those motions that the order of the New Hampshire Public Utilities Commission, under review in this appeal, is the lawful exercise of an authority delegated by the Congress of the United States to the State of New Hampshire. Contrary to the claims of the appellants, Part I of the Federal Power Act does not preempt the exercise of that authority by the State of New Hampshire. The area preempted by the United States pursuant to Part I of the Federal Power Act is the licensing of projects upon the navigable

rivers of the United States. Nothing in the order of the New Hampshire Public Utilities Commission affects the licensing of any hydroelectric project upon the Connecticut River. The order deals only with the sale of power generated at any facility properly licensed by the United States.

Further, as it is authorized to do, the Congress has delegated to the State of New Hampshire the authority to regulate a narrow segment of interstate commerce in hydroelectric energy. That such a delegation has been effected is apparent from the words of Section 201(b) of the Federal Power Act (16 USC 824(b)), from its context, and from the timing of its enactment.

The authority delegated to the State of New Hampshire by that section is as plenary within its own limits as is the

authority conferred generally upon the Federal Energy Regulatory Commission by the remainder of Part II of the Federal Power Act. Pursuant to that delegated authority, the State of New Hampshire may regulate the rates, terms, and conditions of sale of hydroelectric power generated in New Hampshire, and sold at wholesale to other utilities in New Hampshire.

Nothing contained in Public Utilities Commission v. Attleboro Steam and Electric Company, 273 US 83 (1927), compels a different conclusion. The inherent prohibitory effect of the commerce clause is very narrow. On the other hand, the permissive authority contained in that clause, which the Congress may delegate to a State, is very broad. Attleboro, above, prohibited only the State regulation of the price at which electric energy, generated in one State, is sold in another State at

wholesale. Consequently, even in the absence of Section 201(b) of the Federal Power Act, the State of New Hampshire would be authorized to regulate the selling price of power both which is both generated and sold within the State of New Hampshire. Thus, the otherwise exclusive rate-making authority vested in the Federal Engergy Regulatory Commission by Part II of the Federal Power Act does not preempt the order of the New Hampshire Public Utilities Commission now under review.

The order of the New Hampshire Public Utilities Commission now under review is consistent with the privileges and immunities clause of the United States Constitution. Art. IV, Sec. 2, cl. 1. That clause provides only that citizens of one State, when in another State, shall enjoy in the host State the same privileges which the citizens of the host State there

enjoy. The order of the New Hampshire Public Utilities Commission now under review does not deprive any citizen of the State of Rhode Island, located in New Hampshire, the right to purchase, on terms equivalent to those enjoyed by the citizens of New Hampshire, energy generated at the hydroelectric facilities located in the State of New Hampshire. To give credence to the argument of the appellants, would have this Court mandating that the State of New Hampshire confer benefits upon citizens of other States at locations well beyond the borders of the State of New Hampshire. That the United States Constitution does not require.

Lastly, Section 201(b) of the Federal Power Act (16 USC 824(b)) is a valid exercise of the power of the Congress of the United States pursuant to the commerce clause. Art. I, Sec. 9, cl. 3.

The Congress may address a particular problem by several different means, and may condition the exercise of delegated congressional authority upon a showing of willingness and competence to exercise that authority. Thus, when the Congress sought to regulate the sale of electric energy at wholesale, it recognized the demonstrated willingness of some States by authorizing those States to perform that regulation, while providing a federal agency to perform that regulation in those other States which had not demonstrated the willingness or the competence to do so.

The limits upon congressional power to regulate interstate commerce are found only in the United States Constitution. The only limit which these appellants have standing to raise before this Court is the reservation of power in the States by the Tenth Amendment to the United States

Constitution. Clearly, the regulation of interstate commerce, having been expressly conferred upon the United States, was not reserved to the States by the Tenth Amendment. The only enactment of Congress which would contravene the Tenth Amendment would be an enactment which, addressing States as States, deprived those States of attributes which would be essential to their separate and independent existence. Section 201(b) does not affect at all the existence of the State of Rhode Island. Further, the Rhode Island officers who are the appellants in the instant appeal, appear upon behalf of the citizens of Rhode Island, and, therefore, lack standing in their representative capacity to urge the unconstitutionality of an enactment of the Congress. With regard to the citizens of Rhode Island, in their relationship to the

United States, it is the United States which stands parens patriae to those citizens.

CONCLUSION

For the reasons stated herein, and more fully set forth in the State's motions to dismiss or affirm in Nos. 80-1208 and 80-1471, either this appeal should be dismissed or the judgment of the Supreme Court of the State of New Hampshire should be affirmed.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

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